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No. 81-55

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

—against—

PAUL IRA FERBER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND *AMICUS CURIAE* BRIEF

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Covenant House hereby respectfully moves for leave to file the attached brief *amicus curiae* in support of The People of the State of New York's petition for certiorari in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

Interest of Covenant House

Covenant House is a New York not-for-profit corporation. Its principal activity has always been child care, first in group homes providing long-term care to small groups of homeless children, then, beginning in 1977, extending temporary shelter, care and counselling to thousands of run-

away or destitute children annually (7,360 new cases in 1980 alone). Covenant House's Under 21 crisis shelter, located in the Times Square area of Manhattan, includes a fully staffed medical clinic, a public school, a battery of professional social workers, a large child-care staff, a cafeteria serving three meals a day, and accommodations for approximately 200 children per night.

The location of the Under 21 center and its no-strings open-intake policy have brought Covenant House into constant confrontation with the sex industry that dominates the Times Square landscape and feeds upon the desperation of the young people attracted there. The majority of the children housed at Under 21 have been sexually exploited at least in the sense of having been forced to trade sex for food or shelter. A significant minority has been used in the production of child pornography. As Covenant House is one of a tiny number of organizations with significant experience in caring for sexually exploited children, it has the obligation to represent the interests of those children before this Court in a case as critical as this for their future.

Importance of Case for Sexually Exploited Children

Because this case arose as a criminal action, its issues have been largely framed as a clash between the power of the state and the purported First Amendment rights of the respondent. Left out of the analysis—because of the incapacity of the parties and the Court below to understand the scope of the problem—has been a serious consideration of the interests of the victims of the "kiddie porn" industry.

As outlined in the attached brief, those interests are not tangential to this case—they are fundamental. The distri-

bution of child pornography not only seriously extends and deepens the injuries to children from the production of such material, but it causes, too, harms completely distinct from the original sexual exploitation. New York was fully justified, based on the privacy interest of the children involved, in prohibiting the distribution of certain specifically defined varieties of child pornography.

Covenant House in its attached brief brings to this case a consideration of this central privacy issue, and attempts in factually oriented appendices to outline the wealth of material bearing on the subject of sexual exploitation of children. Analysis is included, as well, of the criminal nature of distributing "kiddie porn" on the basis of the illegality of its productior under state and federal law.

Far more important than acceptance of the attached brief, however, is serious consideration by the Court of the petition for certiorari. The constitutional guidelines for meaningful regulation of sexual exploitation of children in the pornography industry are at this time so murky as to be useless. Other states, many with statutes similar to New York's, and the federal government are desperate for concrete guidance. Thousands of children, finally, have paid and will pay the price for such confusion—selling their most private personal dignity, then living with the consequences of knowing the sale is endlessly available for public viewing. It is on their behalf that Covenant House respectfully submits this attached brief and begs the Court to grant the writ of certiorari.

Respectfully submitted,

Edmund J. Burns
Attorney for Covenant House
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Questions Presented

1. Can a state act to protect the privacy of children who are being exhibited in specifically defined, graphic sexual activity by banning the distribution of material containing such exhibitions of children?

2. Does the state's interest in suppressing the criminal conduct of using children in specifically defined, graphic sexual performances justify the prohibition of promoting such performances, where such promotion extends and deepens the harms of the underlying crime?

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BRIEF *AMICUS CURIAE*

Statement of Interest

As more fully explained in the accompanying motion, Covenant House is a non-profit organization dedicated to the shelter and care of destitute children. Most of the thousands of children in its care each year have been sexually exploited, many have been involved in pornography. Covenant House is before the Court as amicus curiae representing the victims of the "kiddie porn" industry.

SUMMARY OF ARGUMENT

The distribution or exhibition of material depicting children engaged in such graphic sexual activity as masturbation, normal or deviate sexual intercourse, sado-masochistic

abuse or bestiality causes severe harms to the children involved. New York, in Penal Law § 263.15,* prohibited the promotion of specifically defined sexual performances by children in order to serve two vital state interests: (1) protection of the privacy of the children induced to participate in such performances; and (2) suppression of conduct that compounds the original crime of producing child pornography.

New York's assault on the sexual exploitation of children in no way dilutes First Amendment guarantees of free expression. Those guarantees do not permit the nonconsensual invasion of children's privacy through public display of their most intimate conduct. Nor does the First Amendment prevent the proscription of speech in furtherance of an illegal activity—here the federal and state crimes of producing child pornography. The harms from promoting even technically "non-obscene" child pornography far outweigh any political, social or intellectual benefit from such activity. Because children's sexual performances cannot be consensual in any meaningful sense, their exhibition involves none of the traditional rationale for protecting individual self-expression.

The majority decision below, overruling the trial and lower courts and invalidating New York Penal Law § 263.15, involves far more than one state's effort to protect its children from sexual exploitation. The validity of similar statutes in at least eighteen other states is seriously clouded, as is any possibility of effective protection of children nationally. In the midst of legal confusion and extraordinary danger to the young, this Court should in its discretion grant the petition for a writ of certiorari.

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* New York Penal Law § 263.15 is reprinted in Appendix G.

ARGUMENT

I.

Importance of the Case

The "peculiar vulnerability" of children, *Bellotti* v. *Baird*, 443 U.S. 622, 634 (1979) *(Bellotti II)*, is not mere popular prejudice; it is a certainty deeply embedded in history and legend—from Joseph's sale into Egyptian slavery, to the murder of the Princes in the Tower, to Smike's brutal persecution by Wackford Squeers in *Nicholas Nickleby*, to the poisoning of young children by their parents at Jonestown. In every age humanity has furnished a more than adequate supply of adults eager to exploit that vulnerability, while human ingenuity has continued to invent new tools and new rationalizations for the exploitation.

If the judiciary has had its share of triumphs in piercing those rationalizations, *see, e.g., In re Gault*, 387 U.S. 1 (1967); *Haley* v. *Ohio*, 332 U.S. 596 (1948), it has suffered some barbaric defeats as well. *See Child Labor Tax Case*, 259 U.S. 20 (1922); *Hammer* v. *Dagenhart*, 247 U.S. 251 (1918).[1] Among the latter must now be numbered the case at bar, in which the New York Court of Appeals fell victim

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[1] More outrageous examples are of course available:

> "Prior to the Victorian era the execution of a child was by no means unusual. For example, in 1801 a boy aged thirteen was publicly hanged for breaking into a house and stealing a spoon. In 1808 a girl aged seven was hanged at Lynn, and in 1831 a boy of nine was hanged at Chelmsford for having set fire to a house. Such practices undoubtedly were accepted, perhaps even enjoyed by the English public in general. They found support in the words not only of sitting judges, but also of oracles of the law such as Coke, Blackstone and Stephen. . . ." Christoph, *Capital Punishment and British Politics* 15 (1962).

Hammer v. *Dagenhart* was, of course, explicitly overruled in *United States* v. *Darby*, 312 U.S. 100, 117 (1941).

to the pieties offered by the newest class of child exploiters —the distributors of child pornography. With a myopic absolutism rivalling the exaltation of the "right of contact" over laborors' welfare in *Lochner* v. *New York*, 198 U.S. 45, 64 (1905), the Court of Appeals found that protection of children from even the grossest forms of sexual abuse and public humiliation must yield to "the freedom of speech" of pornography distributors.

The District Attorney for New York City has ably attacked this decision on its own terms in his Petition for a Writ of Certiorari. Yet so perverse is the approach of the Court of Appeals to this whole question that Covenant House believes this Court should disregard the narrow, categorical approach adopted below, and instead carefully consider what interests of *children*—and of society at large —are at stake in this controversy. Those interests include far more than the indirect suppression of sexual abuse; they encompass the most fundamental privacy rights, psychological well-being, and potential rehabilitation of the children involved. They include, too, the interest of the state in regulating conduct which promotes and extends criminal activity.

Consideration of these interests by this Court is vital not simply because of this case's pernicious implications for New York. Rather, similar statutes of eighteen other states regulating child pornography,[2] the children they protect, and the future of defendants tried under those statutes clearly hang in the balance.[3] Equally important, a decision by the Court in this case would substantially influence the

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[2] N.Y. Penal Law § 263.15, proscribed the distribution of materials which depicted children engaged in explicit sexual acts without insisting the material be obscene. For a list of similar state statutes see Appendix A.

[3] New York's law is the first such statute to be held unconstitutional by a state court. *See* note 7 *infra*.

approach of Congress and many state legislatures, who have been constrained in their response to this problem by the lack of clear guidance from this Court.[4] A more confined attack on the child pornography industry than that launched by New York is generally ineffective,[5] and it seems clear that Congress would be eager (absent fears of judicial disapproval) to adopt the New York model.[6] Only an authoritative resolution of the constitutional issues by this Court can allow the federal and state governments to act effectively and in concert against the abuses of the child pornography industry.

Other considerations equally compel a grant of certiorari in this case. The only two decisions issued by Federal Courts on the question presented are confusing and contradictory.[7] Even the few commentators are divided as well.[8]

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[4] Protection of Children Against Sexual Exploitation Act of 1977, 18 U.S.C. §§ 2251-2253 (Supp. III 1979), applies to distribution of child pornography only if the material is legally "obscene." For similar state statutes see Appendix A.

[5] Since the enactment of the federal statute against child pornography there have been very few prosecutions brought under its provisions, as evidenced by the absence of a single reported decision construing it. According to the United States Department of Justice, only thirteen indictments have been obtained under the "distribution" section of the 1977 federal act (18 U.S.C. § 2252 (a)(1), (2) (Supp. III 1979)); only one indictment, and no convictions, has been obtained under the "production" section of that act (18 U.S.C. § 2252(a)(1)(A), (2)(A) (Supp. III 1979)).

[6] *See* note 40 *infra*.

[7] *Graham* v. *Hill*, 444 F. Supp. 584, 592 (W.D. Tex. 1978) (a statute limited to prohibiting the depiction of minors actually engaged in sexual activity would be constitutional, without obscenity requirement); *St. Martin's Press, Inc.* v. *Carey*, 440 F. Supp. 1196, 1204-1206 (S.D.N.Y. 1977) (suppression of "arguably non-obscene" book under New York's Penal Law § 263.15 preliminarily enjoined, based on "serious" questions as to the statute's constitutionality), *rev'd on other grounds*, 605 F.2d 41 (2d Cir. 1979).

[8] *Compare*, Note, *Protection of Children from Use in Pornography*, 12 J. L. Ref. 295, 312-318 (1979) (regulation of distributors

This confusion is highlighted by the existence of two seemingly unrelated federal statutes—one forbidding conduct which would "promote" racketeering activity, 18 U.S.C. § 1952 (1976), the other proscribing the disclosure of the contents of any conversation which was the subject of an illegal wiretap, 18 U.S.C. § 2511(c) (1976). Each of those statutes penalizes speech which, like a film produced from the sexual abuse of a young child, is the fruit of criminal activity, and which extends the damage of the original crime.

Compared with the health and safety of thousands of children which this case so urgently involves, considerations of judicial economy can be only of secondary importance. Yet with the confusion pervading legal analysis of this issue—nowhere more evident than in the decision below—a decision by this Court in this case can only be of great service to jurists and legislators. If any order is to come to this cluttered corner of the law, this Court must bring it.

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of child pornography without obscenity requirement constitutional); *with* Note, *Child Pornography Legislation*, 17 J. Fam. L. 505 (1978-79) (unconstitutional) *and* Note, *Child Pornography: A New Role for the Obscenity Doctrine*, 1978 U. Ill. L. F. 711, 740-744 (unconstitutional). *See*, Comment, *Preying on Playgrounds: The Sexploitation of Children in Pornography and Prostitution*, 5 Pepperdine L.R. 809, 824-832 ("If the state can constitutionally protect a minor's welfare by restricting materials available to him or her, it follows that the state possesses authority to prohibit publication of sexually explicit materials which use minors as subjects." *Id.* at 831) None of these commentaries considers the impact of children's privacy rights on the First Amendment questions, nor the fact that photographing children engaged in sexual conduct is, unlike the photographing of adult sexual activity, illegal under federal law. *See* Emerson, *The Right of Privacy and Freedom of the Press*, 14 Harv. C.R.-C.L.L. Rev. 383 (1980).

II.

The State Has a Compelling Interest in Regulating the Distribution of Sexually Explicit Photographic Portrayals of Minors.

A. *The Production of Photographic Material Displaying Minors Engaged in Sexually Explicit Conduct Entails Serious Harm for the Child Participants.*

Informed members of the scientific community have described participation in "kiddie porn" to be "highly destructive to children," [9] "devastating," [10] and likely to produce "psychic trauma" and "[m]assive acute anxiety" for the children involved.[11] Just as it was impossible to be "scientifically certain" of the effects on young people of exposure to sexually graphic material, *Ginsberg* v. *New York*, 390 U.S. 629, 643 (1968), so now it cannot be proved beyond cavil what are the results of participation of youths in the production of such material. For the children there is no scientific certainty; but "the victim of sexual exploitation has to live the rest of his or her life with those memories of what pornography and deviation brings upon [him or her.]" [12]

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[9] Densen-Gerber & Hutchinson, *Developing Federal and State Legislation to Combat the Exploitation of Children in the Production of Pornography*. Reprint of unpublished article from the Journal of Legal Medicine, September 1977 (Institute of Law & Medicine, Division of Odyssey Institute, New York, N.Y.). For a full list of authorities treating the effects of sexual exploitation of children, see Appendix B.

[10] Weeks, *The Sexually Exploited Child*, 69 S. Med. J. 848, 850 (1976).

[11] Schoettle, *Child Exploitation: A Study of Child Pornography*, 19 J. Am. Acad. Child Psych. 289, 296 (1980) [hereinafter cited as *Child Exploitation*]; Schoettle, *Treatment of the Child Pornography Patient*, 137 Am. J. Psych. 1109, 1110 (1980).

[12] *Sexual Exploitation of Children, Hearings Before the Subcommittee on Crime of the House Committee on the Judiciary*, 95th Cong., 1st Sess. (hereinafter *Sexual Exploitation of Children I*), 62-63 (testimony of Inv. Lloyd H. Martin, L.A. Police Dep't).

That it is harmful for a young boy or girl to participate in masturbation, bestiality, sado-masochism, or other form of explicit sexual activity in front of a camera, for later public distribution, is simple common sense. New York and a vast majority of the states, as well as the federal government, have prohibited using children for that purpose.[13] As this Court only last term recognized that "a State may regulate the sexual behavior of minors" and may even "make sexual intercourse among teenagers a criminal act." *Michael M.* v. *Sonoma County Superior Court*, 101 S. Ct. 1200, 1206 n.8 (1981), & 1218 (Stevens, J., dissenting), the constitutionality of these enactments seems beyond serious doubt.

B. *Distribution and Exhibition of Sexually Explicit Photographs of Children Harms the Children Separately from Production of Such Material.*

Hopelessly forgotten in the opinion below, and in most of the extant commentaries,[14] are the wounds inflicted on children, not by the production of "kiddie porn," but by its subsequent *distribution* to third parties. Yet it is that damage, both separate from and an extension of the original sexual abuse, which is the fundamental justification for the New York law at issue.

Illicit sexual activity, however private and well-concealed, may provoke regret, even trauma in the memories of adults.[15] Child pornography, by comparison, is a "graphic

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[13] 18 U.S.C. § 2252 (Supp. III 1979) (The Protection of Children Against Sexual Exploitation Act of 1977); N.Y. Penal Law § 263.05 (McKinney 1980). For a complete list of other states' relevant statutes, see Appendix A.

[14] Note, *Child Pornography Legislation*, 17 J. Fam. L. 505 (1978-79); Note, *Child Pornography: A New Role for the Obscenity Doctrine*, 1978 U. Ill. L.F. 711. *But see* Note, *Protection of Children from Use in Pornography*, 12 J. L. Ref. 295, 301 (1979).

[15] The Reverend Dimmesdale in *The Scarlet Letter* is a remarkable, if perhaps unrepresentative example.

form of exhibitionism . . . [which] literally makes the child's body 'available' for anyone willing to pay the price anywhere in the world." [16] Damaging as the initial sexual abuse may be, "it is the *fear of exposure* and the tension of keeping the act secret that seem to have the most profound emotional repercussions." [17] The child photographed must live with this fear ceaselessly; unlike a prostitute, the child's sexual act cannot simply be forgotten or placed in perspective.[18] It is available to the public for constant reenactment. That availability means of course, perpetual insecurity for its victim: no rehabilitation, however complete, can shield the person exploited as a child from later public exposure and ridicule.[19] At least the sexual abuse involved in producing child pornography is an action limited in duration; distribution of it may be endless.

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[16] *Child Exploitation, supra* note 11, at 292.

[17] *Id.* (emphasis added). *See also* Burgess & Holmstrom, *Sexual Trauma of Children and Adolescents,* 10 Nursing Clinic N. Am. 551 (1975).

[18] "It was procedure to keep a blackmail photo file of each boy to avoid any squealing . . ." Gerald S. Richards, convicted for molesting a 10 year-old boy, filmed, processed and sold child pornography film, and sold the sexual services of his young male models. Sneed, *Father Teacher: Tangled Life of Child Pornographer, Chicago Tribune* (May, 1977), *reprinted in Protection of Children Against Sexual Exploitation, Hearings Before the Subcommittee to Investigate Juvenile Delinquency of the Senate Committee on the Judiciary,* 95th Cong., 1st Sess. 135-36 (1977).

[19] *See* L. Lovelace, *Ordeal* (1980). "But the world won't let Linda Lovelace rest in peace. Today I still can't go to a supermarket or a bus station or a high school basketball game without the risk—the whispers, the pointed fingers, the stampedes. . . . My particular concern is with my three-year-old son, who will someday have to learn that his mother was once this woman named Linda Lovelace." *Id.* at 1.

And: "Once I'm identified, our life falls apart. My husband has to leave his job to protect us and to move us somewhere else. Where I'm recognized again and again, I'm the target of freaks and degenerates." *Id.* at 261.

Ultimately, the problem of child pornography distribution distills to that of personal privacy:

> We cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figure from the view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and dignity. . . . We do not see how it can be argued that the searching of one's home deprives him of privacy, but the photographing of one's nude body, and the distribution of such photographs to strangers, does not.

York v. *Story*, 324 F.2d 450, 455 (9th Cir. 1963), *cert. denied*, 376 U.S. 939 (1964). Because of children's "inability to make critical decisions in an informed, mature manner," *Bellotti II*, 443 U.S. 622, 634 (1979), there can be little dispute that a child's participation in sexually exploitive conduct is presumptively nonconsensual.[20] *See Elkington* v. *Foust*, 618 P.2d 37 (Utah 1980). When a fifteen-year-old boy can purchase movies of himself in local pornography retail outlets,[21] it is the most pathetic optimism which asserts he has not been fundamentally, irreparably harmed.

C. *Violation of a Child's Most Basic Privacy Right—to the His Sexual Integrity—Has No Protetion Under the First Amendment.*

The distribution of films depicting normal or deviate sexual intercourse, bestiality, masturbation, or sado-masochistic abuse is obviously harmful to the children exhibited, and it occurs without even the slightest suggestion

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[20] For factual background on the question of children's "consent" to sexual exploitation, *see* Appendix C.

[21] The recent boast of a resident at Covenant House, quoted in article by G. Ruffini, New York *Post*, June 10, 1981, at 15.

of the children's consent.[22] In erecting its sand cathedral to the First Amendment, the New York Court of Appeals did not even consider the most critical interest of the children sacrificed on the altar: the *right to privacy.*

In *Katz* v. *United States,* 389 U.S. 347 (1967), this Court emphasized that "the protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual States." *Id.* at 350-51 (footnotes omitted).[23]

It was in the context of human sexuality that a constitutional "right to privacy" was first explicitly recognized by this Court, *Griswold* v. *Connecticut,* 381 U.S. 479 (1965), and indeed it has been in that context that the right has been most searchingly examined. *H.L.* v. *Matheson,* 101 *S. Ct.* 1164 (1981).; *Bellotti II,* 443 U.S. 622 (1979); *Bellotti* v. *Baird,* 428 U.S. 132 (1976) (Bellotti I); *Planned Parenthood of Central Missouri* v. *Danforth,* 428 U.S. 52 (1976). *Doe* v. *Bolton,* 410 U.S. 179 (1973); *Roe* v. *Wade,* 410 U.S. 113 (1973). The privacy interest in this case encompasses that of specifically defined sexual conduct and shielding such conduct from exhibition to strangers. *York* v. *Story,* 324 F.2d 450, 455 (9th Cir. 1963), *cert. denied,* 376 U.S. 939 (1964).[24] The children whom New York seeks to protect have been publicly displayed, in person and on film, in the midst of extremely graphic sexual activity.

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[22] *See* Appendix C.

[23] For background on the development of a "right of privacy" *see* Appendix D.

[24] In that case, circulation of photos taken of plaintiff at police station after told to undress held actionable as violation of state and constitutional privacy rights. *See Forts* v. *Ward,* 434 F. Supp. 946 (S.D.N.Y.), *rev'd on other grounds,* 566 F.2d 849 (2d Cir. 1977).

Here New York is trying simply to shield its children from such a disasterious sequence of exploitation by private individuals. This case thus squarely presents the question left open in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469, 491 (1975): "whether the State may ever define and protect an area of privacy free from unwanted publicity . . . ." *See Time* v. *Hill*, 385 U.S. 374, 384 n.9 (1967). If a zone of personal privacy may in fact be defined, surely it would include sexual relations, or, at the very least, sexual relations involving children.[25] While, of course, "news" about such events might be privileged, photographic reproductions of the event, barring a consent the child is unable legally to give, would not.[26]

In 1977 this Court took two long strides toward recognizing a state's right to establish "an area of privacy" for its citizens. First, *Whalen* v. *Roe*, 429 U.S. 589 (1977), analyzed the "two different kinds of interests" that comprise the constitutional interest in "privacy": (1) "the individual interest in avoiding disclosure of personal matters"; and (2) "the interest in independence in making certain kinds of important decisions." *Id.* at 599-600 (footnotes omitted). The first interest is obviously at stake in this case, where New York's statute stands as the only effective deterrent to graphic disclosure of the most personal, most intimate details of the experiences of many sexually abused children. The statute more subtly protects the "independence" interest as well, for children used in production of

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[25] In *Carey* v. *Population Services Int'l*, 431 U.S. 678 (1977), this Court found that children under 16 had a constitutional privacy interest encompassing decisions regarding contraception. In that case a New York statute infringed the privacy interest of the children; here New York's statute seeks to *protect* that interest.

[26] *See* Restatement (Second) of Torts, § 652D, Comment h (1977) ("There may be some intimate details of her life, such as sexual relations, which even the actress is entitled to keep to herself.").

sexually explict material are generally deprived of any independent decision whether to permit its distribution.[37]

Close on the heels of *Whalen*, *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), considered one aspect of traditional privacy law in the context of First Amendment guarantees. Echoing the laudatory discussion of the "impressive credentials" of the "right of privacy" set forth in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. at 487-89, the Court in *Zacchini* recognized a "right of publicity" protecting a performer from the broadcast of his entire act on a TV news show. Basing its decision on the importance of the performer's "proprietary interest" in his act, along the lines of copyright and patent law, the Court once again distinguished the "intrusion" and "private details" branches of privacy law, both from libel and "false light" actions and from the "right of publicity." 433 U.S. at 572-74. *See also* 433 U.S. at 581-582 (Powell, J., dissenting) (alluding to Prosser's "classic" article[38] on "right of privacy" tort suits).

Sexually exploited children are also part of "acts;" surely they, too, have a "proprietary interest" in films taken of them, without their consent, for "entertainment purposes." Beyond that, of course, the analogy to *Zacchini* breaks down, for children who have been sexually abused have no interest, as did Mr. Zacchini, 433 U.S. at 578, in gaining widespread publicity of their "performances." If the Court reverses the decision below, the public will lose access to the sight of those children in the midst of sexual intercourse, masturbation, bestiality, and sado-masochism.

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[37] *See* Appendix C. *See also McKenna* v. *Fargo*, 451 F. Supp. 1355, 1380-1381 (D.N.J. 1978) (applying *Whalen* v. *Roe* to psychological exams administered by Fire Department to applicants). *See* Emerson, *The Right of Privacy and Freedom of the Press*, 14 Harv. C.R.-C.L. L. Rev. 329 (1979).

[38] Prosser, *Privacy*, 48 Cal. L. Rev. 383 (1960).

The Court must decide whether that loss is worth the gain in protection of children's interest in personal privacy. It would seem a strange constitution, however, that permitted a seasoned circus performer to punish the broadcast of his act on local TV[29] yet prevented a twelve-year old boy from stopping a display of his sexual abuse in an adult movie theatre.

III.

Distribution of Child Pornography Is Part of a Course of Conduct Illegal From Its Inception, and so Subject to Criminal Penalties.

Material depicting explicit sexual conduct by children is unique among the various forms of current popular entertainment in that its very production is illegal—*whether or not* it is legally "obscene."[30] "Promotion" or distribution of such material is thus precisely the same as "promotion" of racketeering activity or the "distribution" of the contents of conversations that were illegally wiretapped.[31] The underlying activity is illegal; its promotion or distribution is simply the furtherance of crime. *See Smith* v. *Daily Mail Publishing Co.*, 443 U.S. 97, 105 (1979); *New York Times Co.* v. *United States*, 403 U.S. 713, 733-37 (1971) (White, J., concurring).

Distributors of defined material, moreover, know that what they sell was produced in violation of either state or

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[29] Or Mohammed Ali to punish Playgirl Magazine for publishing a "portrait" (not photograph) of him in the nude, *Ali* v. *Playgirl, Inc.*, 447 F. Supp. 723 (S.D.N.Y. 1978). *See also Meeropol* v. *Nizer*, 560 F.2d 1061 (2d Cir. 1977) (Louis Nizer's private letters entitled to copyright protection), *cert. denied*, 434 U.S. 1013 (1978). *See* Appendix D.

[30] 18 U.S.C. § 2252(a) (Supp. III 1979); N.Y. Penal Law § 263.05 (McKinney 1980).

[31] *See* p. 17 *infra*.

federal law, barring very special circumstances.[33] This is true whether the photos distributed appear in a scientific journal, a Broadway play, a Bible, or an adult bookstore.[34] Like the product of illegal child labor, such material should be rightly regarded as contraband and its purveyors punished.[34]

Where speech is directed at the furtherance of illegal activity, its constitutional protections are scanty at best. Thus, it is constitutional to prohibit speech containing price information on the basis only of a presumption that competition will be impaired. *United States* v. *Container Corp. of America*, 393 U.S. 333 (1969). It likewise violated no First Amendment rights when Congress and the states "strictly regulated public expression by issuers of and

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[33] Material produced prior to 1977 would arguably not be the product of criminal activity, though it seems likely that the child labor laws [*see* N.Y. Labor Law §§ 130-132 and similar provisions in other states, and 29 U.S.C. § 212 (child labor penalized), were technically applicable to nearly all child pornography production prior to that date. Material produced abroad involves other special problems not presented by this case. *See St. Martin's Press, Inc.* v. *Carey*, 605 F.2d 41, 44 (2d Cir. 1979) (holding *inter alia*, that the statute in question in this case would not apply to photographs of youths taken abroad prior to 1977. *Cf. United States* v. *McClain*, 545 F.2d 988 (5th Cir. 1977) (federal statute condemning the receipt of stolen goods may be applied to goods "stolen" in another country, even where technical questions of "theft" under foreign law are involved).

[34] "The invasion of privacy that is to be protected is equally complete and equally injurious, whether the motives by which the speaker or writer are actuated are, taken by themselves, culpable or not . . ." Warren & Brandeis, *The Right of Privacy*, 4 Harv. L. Rev. 193, 218 (1890). *See, e.g., Griffin* v. *Medical Society*, 7 Misc. 2d 549, 11 N.Y.S.2d 109 (Supreme Ct., N.Y. Co. 1939) where the Court upheld the application of New York's right to privacy law, N.Y. Civil Rights Law §§ 50, 51 (McKinney, 1980 & Supp. 1980), when surgeons published the case history of a patient in a medical journal without his consent.

[34] *See*, 18 U.S.C. § 1952 (1976) (proceeds from racketeering activity); 18 U.S.C. § 2511(c) (1976) (contents of illegally wiretapped conversation); 29 U.S.C. § 212 (1976) (fruits of child labor).

dealers in securities, profit-sharing 'coupons,' and 'trading stamps,' commanding what they must and must not publish and announce." *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 61-62 (1973); *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 453 (1978). Outside strictly commercial contexts, speech which produces an agreement "to commit any offense against the United States" is punishable as felony conspiracy. 18 U.S.C. § 371 (1976). *See United States* v. *Edwards*, 458 F.2d 875 (5th Cir. 1972) (conspiracy statute constitutional), *cert. denied*, 409 U.S. 891 (1972). *See also New York Times Co.* v. *United States*, 403 U.S. 713, 733-40 (1971) (White, J., concurring).

Though the distribution of child pornography is an overwhelmingly commercial affair, and one often tinged with the hues of conspiracy, it is most closely analogous to the "promotion" of "racketeering" activities, 18 U.S.C. § 1952 (1976), and the "disclosure" of information obtained through wiretapping, 18 U.S.C. § 2511 (1976 & Supp. III 1979). It is critical to note that the latter section applies as well to disclosure of "the contents of any wire or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire or oral communication in violation of this subsection." *Id.* § 2511(1)(c). A closer parallel to the distributor of juvenile sexual performances, who know that their contents offend the criteria of New York and federal law, is not possible. Both the anti-wiretapping and anti-racketeering statutes have withstood constitutional challenges based on the First Amendment. *See, e.g., United States* v. *Cerone*, 452 F.2d 274 (7th Cir. 1971) (gambling statute), *cert. denied*, 405 U.S. 964 (1972); *United States* v. *Becker*, 334 F. Supp. 546 (S.D.N.Y. 1971) (anti-wiretapping statute). *See also United States* v. *Nardello*, 393 U.S. 286 (1968) (construing and explaining anti-racketeering provisions).

Though the harms to the children involved are distinct at the production and distribution phases of child pornography, the system of sexual exploitation is all of a piece. The enormous annual production of child pornography is made possible only because a huge distribution network insures broad marketing capacity and almost complete anonymity for the producers.[35] The harm to the children involved, likewise, is as severe as it is only because of a broad public exposure, through distributors, of the minor's sexual conduct. Because that public exposure may well be the worst of the harms the sexual exploitation process inflicts on minors, and because of the extraordinary anonymity afforded to the producers of "kiddie porn" by its distributors, it is perverse to imagine that a focus only on production has any hope of success. New York was thus right to adopt a multi-pronged assault on the child pornography industry, capable of putting substantial pressure on its most crucial link.[36]

IV.

Sexually Explicit Photography Is "Speech" Only in a Limited Sense, Which Permits Its Regulation for the Benefit of the Performers.

Challenging as it does so many facile categories of First Amendment adjudication, this case perhaps affords the Court a chance to look again carefully at the meaning of the words "speech" and "press" in the Constitution. It is, of course, beyond question that motion pictures and live theatre are "speech" for purposes of the First Amendment.

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[35] *See* Guio *et al., Child Victimization: Pornography and Prostitution*, 3 J. Crime & Just. 65 (1980). For a brief discussion of the structure of the pornography industry, *see* Appendix E.

[36] Most other states with child pornography statutes have adopted a similar, multi-pronged approach. *See* Appendix A.

Joseph Burstyn, Inc. v. *Wilson*, 343 U.S. 495 (1952). Yet it is also clear that the photographic recording of a young boy masturbating—without his free, mature consent—strains any conceivable definition of "speech" or even "press".

The strain is apparent in two ways. First, the child's lack of voluntary participation, at least under legal presumption, removes a critical aspect of protected "speech" —that it somehow expresses one's own, as opposed to one's master's, thoughts. Thus Justice Stewart could comment in his concurrence to *Ginsberg* v. *New York:* "I think a State may permissably determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that *full capacity for individual choice* which is the presupposition of First Amendment guarantees." 390 U.S. at 649-50 (emphasis added) (footnote omitted). Second, if the "speech" is regarded as that of the director or cameraman, it is obvious that its expression requires the complete *suppression* of self-expression—in the context of sexual abuse—of the child. *Cf. Ginsberg* v. *New York*, 390 U.S. at 649 (Stewart, J., concurring); *Kovacs* v. *Cooper*, 336 U.S. 77, 86 (1949) & 97 (Frankfurter, J., concurring) (sound amplification may be constitutionally regulated to protect "freedom of thought").

In the face of this tension it may be worth reconsidering whether child pornography can ever have any constitutional protection,[27] though not judged legally "obscene," for such material appears to be like "fighting words"—of "no essential part of any exposition of ideas, and . . . of such slight social values as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky* v. *New Hamp-*

[27] *See* Appendix F.

shire, 315 U.S. 568, 572 (1942). It hardly seems possible that to call a policeman a "damned racketeer" may be punished as a crime, *id.* at 574, while sale of children's bodies receives constitutional baptism.

CONCLUSION

In 1977 Congress enacted the Protection of Children Against Sexual Exploitation Act of 1977,[38] having concluded, based on extensive hearings, that "child pornography and child prostitution have become highly organized, multimillion dollar industries that operate on a nationwide scale" and, further, "the use of children . . . as the subjects of pornographic materials is very harmful to both the children and the society as a whole."[39] In course of their consideration of this measure, both houses of Congress determined that the "obscenity" of pornographic materials depicting children should be irrelevant to the criminality of their distributors, an intention thwarted only by time pressures and fears of some that a court might hold such a law unconstitutional.[40]

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[38] 18 U.S.C. §§ 2251-2253 (Supp. III 1979).

[39] *Senate Committee on the Judiciary, Protection of Children Against Sexual Exploitation Act of 1977,* S. Rep. No. 438, 95th Cong., 1st Sess. 5 (1977).

[40] 123 Cong. Rec. H 11,472 (daily ed. Oct. 25, 1977) (vote, 358 to 54, to instruct House conferees to accept Senate version of act, which contained no obscenity requirement for prosecution of distributors). *See* 123 Cong. Rec. S 18,783 (daily ed. Nov. 4, 1977) (statement of Sen. Roth prior to final passage of act.) There is also evidence that the decision of California to require proof of "obscenity" for prosecution of distributors of child pornography was influenced by fears of constitutional problems. *See Obscenity and the Use of Minors in Pornographic Material,* Hearing, California Assembly Committee on Criminal Justice 173 (Oct. 31, 1977 and Nov. 22, 1977) (Statement of Committee Chmn. Keith L. Maddy: "If we go after the distributor then we suddenly face First Amendment problems. . . . [W]e are searching for . . . an answer to the First Amendment problem.").

Now those fears have proven correct, for New York's bolder effort to fight sexual exploitation of children in distribution of child pornography is threatened with collapse. Ignoring the privacy interests of the children put on display and the undeniably criminal nature of "kiddie porn" production, New York's highest court has lifted the ramparts of the First Amendment to forbidding heights—high enough both to shield child abusers and to prevent the rescue of their victims. Refusal of petitioner's request for certiorari in this case would prolong the chaotic arguments over its central issues. Worse, it would allow the irreparable injury and exploitation of thousands of children.

The petition for a writ of certiorari should be granted.

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